

## 2011 DRAFTING REQUEST

### Bill

Received: 10/21/2011

Received By: gmalaise

Wanted: As time permits

Companion to LRB:

For: Jason Fields (608) 266-3756

By/Representing: Lori Youngman

May Contact:

Drafter: gmalaise

Subject: Employ Priv - worker's comp

Addl. Drafters:

Extra Copies:

Submit via email: YES

Requester's email: Rep.Fields@legis.wisconsin.gov

Carbon copy (CC:) to:

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### Pre Topic:

No specific pre topic given

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### Topic:

Worker's compensation; exclusion of athletic officials from coverage

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### Instructions:

See attached--exclude athletic officials form coverage under the worker's compensation law

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### Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	gmalaise 10/25/2011	kfollett 10/27/2011		_____			
/1			rschluet 10/27/2011	_____	lparisi 10/27/2011	ggodwin 11/21/2011	

FE Sent For:

*None*

<END>

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/?	gmalaise	11/5f 10/27		_____ _____			
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FE Sent For:

<END>

**Malaise, Gordon**

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**From:** Youngman, Lori  
**Sent:** Wednesday, October 19, 2011 2:39 PM  
**To:** Malaise, Gordon  
**Subject:** Rep. Fields drafting request  
**Attachments:** Collins - Dave Anderson wiaa independent contractor legislation and backup information - May 9, 2011.doc; SpecReptIndCont copy.pdf

Gordon,

Attached is the information I spoke to you about. The last page of the memo from Donald Collins has possible language for a Wisconsin law.

Please call if you have question or need more information.

Thank you.

*Lori Youngman  
Office of State Rep. Jason Fields  
304 West State Capitol  
PO Box 8952  
Madison, WI 53708  
608-266-3756*



**SAN FRANCISCO UNIFIED SCHOOL DISTRICT**  
**CIF SAN FRANCISCO SECTION**

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May 9, 2011

Dave Anderson, Executive Director  
WIAA  
5516 Vern Holmes Drive  
Stevens Point, WI 54482

Dear Mr. Anderson:

This memo gives you: (A) information on the number of states that have passed sports officials independent contractor legislation; (B) some brief pointers on passing legislation; and (C) draft legislation for Wisconsin.

**A. States that have passed independent contractor legislation:**

Alaska, California, Delaware, Florida, Idaho, Minnesota, Missouri, Montana, Oregon, and Virginia have passed sports official independent contractor legislation. I have attached my Special Report on Independent Contractor Legislation, which provides the statutory cite for most of these state's legislation. Delaware and Minnesota's bills were passed after my special report. If you need the citations from those states, let me know.

Six states have published court opinions holding that amateur sports officials are independent contractors: South Carolina, New Jersey, Pennsylvania, New Jersey, Colorado and Maryland. These courts have found amateur sports officials to be independent contractors in their relationships with schools, leagues and the officials associations which assign the games. My special report has the citations to the cases from these six states. If you need me to, I can do some research for cases published after my Special Report.

Arizona and Louisiana have unpublished court opinions holding that amateur sports officials are independent contractors. These cases are: Aetna Casualty & Sur. v. Arizona Interscholastic Ass'n., No. 2 Ca-Cv 92-0161, 1992 WL 321360, at \*5, 1992 Ariz. App. Lexis 301, at \*14-16 (Ariz. Ct. App. Nov. 10, 1992); and Harvey v. Ouachita Parish Sch. Bd., 545 So.2d 1241 (La. Ct. App. 1989).

## **B. Some brief pointers**

It is important to note that there is really no such thing as “independent contractor” legislation. Rather, there are exemptions from the definition of “employee” for workers’ compensation purposes. Let me explain the significance of this.

All employers must pay workers’ compensation and unemployment taxes on their employees’ wages. Some forms of work are exempt from this requirement. You can gain the exemption by a court ruling or by legislation. In Wisconsin, sports officials probably couldn’t win a court case because there is a statute that defines what a worker must do to be exempt from worker’s compensations taxes. I discussed that statute in my December 13, 2010 memo. Sports officials don’t meet the test for an exemption from workers’ compensation.

In order to gain an exemption, you will have to write legislation making sports officials exempt. You will need to do this on the workers’ compensation side. You should not write an unemployment exemption for two reasons.

First, an unemployment exemption would conflict with Wisconsin’s workers’ compensation statute.

Second, an unemployment exemption would not be consistent with FUTA, and, therefore, it would put Wisconsin’s entire unemployment insurance scheme at risk. This is called a FUTA consistency problem, and I explain that problem in my Special Report.

The FUTA consistency problem is reflected in the fact that only one of the states with sports officials independent contractor legislation has taken the risk of creating an unemployment exemption (and it was a shock that they did so). When states pass workers’ compensation exemptions, the state’s unemployment people usually follow it. However, they’re not obligated to.

To protect yourself on the unemployment side, wait until your workers’ compensation legislation passes, and then write a regulation for your unemployment insurance agency’s administrative code. I can show you how to do that once your workers’ compensation bill passes.

You should also note that the Wisconsin workers’ compensation scheme was set up to bring everybody in. Most states have long lists of occupations that are exempt from the workers’ compensation scheme. Wisconsin does not. That’s going to make it more difficult to pass Wisconsin legislation because you’ll have a tougher time pointing to other exempt occupations. You will have to focus more on the potential costs to schools. You can also point out that this Bill helps schools by cutting taxes on them; that should play well in your state as it appears to have a legislature that is an anti-tax mood.

### **C. Wisconsin Legislation**

An Act to amend the Wisconsin Worker's Compensation Laws.

**Section 102.07 of the Wisconsin Statute's is amended as follows:**

**(19) Any person providing services as a sports official at a sports event in which the players are not compensated in not an employee. In this paragraph, "sports officials" includes an umpire, referee, judge, scorekeeper, timekeeper, organizer, or other person who is a neutral participant in a sports event.**

**IF YOU WANT TO PROTECT TEACHERS ON A BUSMAN'S HOLIDAY –  
THEN ADD THE FOLLOWING**

**This exclusion does not apply to workers' compensation claims against schools, associations of schools or other organizations sponsoring a sports contest where the claimant is a sports official who is a regular employee of such school, association of schools, or other organization sponsoring the sports contest.**

**IF YOU WANT TO SPECIFICALLY ADD SCHOOLS, THEN CHANGE  
THE FIRST PARAGRAPH ABOVE AS FOLLOWS**

**Any person providing services as a sports official at a sports event for an entity sponsoring an intercollegiate or interscholastic sports event or an entity which is a public entity or private organization sponsoring an amateur sports event is not an employee." In this paragraph, "sports officials" includes an umpire, referee, judge, scorekeeper, timekeeper, organizer, or other person who is a neutral participant in a sports event.**

Good Luck,

Donald C. Collins, Commissioner  
CIF San Francisco Section

cc: Bill Topp

**SPECIAL  
REPORT**



THE NATIONAL ASSOCIATION OF SPORTS OFFICIALS

**OFFICIALS &  
INDEPENDENT  
CONTRACTOR  
STATUS**



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**SPECIAL  
REPORT**



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THE NATIONAL ASSOCIATION OF SPORTS OFFICIALS

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**OFFICIALS &  
INDEPENDENT  
CONTRACTOR  
STATUS**

Based Upon a Report  
Written by Donald C. Collins

Edited by Bob Still

The National Association of Sports Officials  
Racine, Wis.

Special Report: Officials & Independent Contractors is based upon a written report by Donald C. Collins and was edited by Bob Still of the National Association of Sports Officials.

Additional copies of this report are available from the National Association of Sports Officials for \$5.00 each.

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Layout by Lisa Martin

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## SPECIAL REPORT: OFFICIALS & INDEPENDENT CONTRACTOR STATUS

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### INTRODUCTION

The determination whether amateur sports officials are employees or independent contractors can have important tax, liability, and labor ramifications. This can affect the way amateur sports officials do business.

This special report attempts to give a coherent overview of this complex issue. This report will discuss: (1) the governing legal standards used in determining whether workers are independent contractors or employees; (2) the ramifications of this determination; (3) the independent contractor status of amateur sports officials under federal law; (4) the independent contractor status of amateur sports officials under state law; (5) current movements to introduce independent contractor legislation; and (6) models for those groups seeking to introduce legislation.

#### 1.) The governing legal standards

Employers must pay social security taxes, state workers' compensation taxes and state unemployment taxes on their employees' wages. However, employers of independent contractors do not have to pay these taxes. See Illinois Tri-Seal Prods. v. United States, 353 F.2d 216, 231 (Ct. Cl. 1965) (employers do not pay federal employment taxes on independent contractors' earnings); Buncy v. Certified Grocers, Inc., 592 So.2d 336, 337 (Fla. 1 DCA 1992) (per curiam) (employers of independent contractors are exempt from state workers' compensation laws).

The distinction between an employee and an independent contractor under both federal law and the law in most states is the degree of control the worker retains over the means of performing the work. An

independent contractor has the right to control the means by which she will obtain the result desired by her employer; an employee does not. Illinois Tri-Seal Prods., 353 F.2d at 228; Brighton Scli. Dist. v. Lvons, 873 P.2d 26, 28 (Colo. Ct. App. 1993).

It is often rather difficult to determine whether a worker has control over the means of performing the work. Thus, federal law and the law in most states provides supplemental factors to assist regulatory agencies and courts in making these determinations. The best known of these supplemental factors are the IRS's twenty factors set out in Rev. Rul. 87-41, 1987-1 C.B. 296. These factors are highly influential — though it should be noted that they lack the weight of a federal court's decision.

2.) The ramifications of the employee/independent contractor determination

Employees are entitled to workers' compensation coverage. Thus, a finding that sports officials are employees eliminates the need for sports officials to self-insure and switches that burden to the schools and teams, leagues, governing bodies and officials associations. Also, employers are vicariously liable for torts committed by their employees but they are not generally liable for torts committed by independent contractors. Quite obviously, employers of amateur sports officials will face a substantial increase in insurance costs and a likely increase in litigation expenses if the officials are deemed employees. Finally, employees are able to unionize and collectively bargain. Independent contractors cannot. NLRB v. United Ins. Co., 390 U.S. 254, 255 n.1 (1968).

3.) Current status under federal law

Neither the courts nor Congress has resolved the question whether amateur sports officials are employees or independent contractors. The IRS has ruled on this issue twice in Revenue Rulings. The federal courts have dealt with the issue once in a labor case.

a.) The revenue ruling

In 1957, the IRS ruled that college sports officials were employees of "an athletic association composed of colleges and universities" for federal tax purposes. Rev. Rul. 57-119, 1957-1 C.B. 331. The college athletic association selected, trained and assigned the officials and required

them to make extensive post-game reports.

In 1967, the IRS ruled that a group of high school officials were independent contractors and not employees of their own associations. The IRS noted that the officials association provided training and assigned the officials games, and found that these acts were not enough to make the officials employees of their own association. Rev. Rul. 67-119, 1967-1 C.B. 284.

The 1967 ruling appears to make amateur sports officials independent contractors if they are organized under a framework where they control the assigning, training, evaluating, and educational functions through associations as opposed to having schools, teams, leagues and governing bodies control those functions. This reflects the modern trend in officiating where schools, teams, leagues and governing bodies have yielded these functions to sports officials associations. Of course, in some places, schools, leagues, or sports governing bodies will act as coordinators of some of these activities. On occasion, they will certify or license officials. At the college levels, they even hire officiating supervisors. However, these functions tend to be vastly different from the total control over the industry that was exercised by the college conference in 1957.

Despite this 1967 ruling, IRS agents still occasionally pursue officials associations. In 1995, the IRS sought employment taxes from the Pacific Northwest Basketball Officials Association (PNBOA). The IRS argued that the PNBOA was not entitled to the protection of the 1967 ruling because they had to meet standards set by the Washington Interscholastic Activities Association (WIAA), the state high school governing body. The PNBOA prevailed because a previous audit had concluded that their officials were independent contractors. Yet, the PNBOA had to spend time and money plus deal with business uncertainty. They quite clearly weren't very pleased with the situation despite their ultimate win. After all, a loss would likely have put them out of business.

Also, the revenue rulings do not clarify whether amateur officials are independent contractors in their relationships with schools, teams, leagues, and sports governing bodies. Under current IRS practices, sports officials appear to generally be independent contractors during the regular season because their associations control the assignments.

However, the revenue rulings leave a large gap as to the postseason status of amateur sports officials.

Thus, as ridiculous as it may sound, an amateur sports official could conceivably be an independent contractor for 364 days of the year, but an employee of the governing body on the one day that she officiates a high school state final, an NCAA championship game or a national Amateur Softball Association (ASA) game. Indeed, the IRS used this argument to assess back employment taxes against the WIAA in 1994. The WIAA prevailed, but they had to spend a lot of money to do it and there's nothing that would prevent another IRS agent from making the same argument about another sports governing body.

b.) The labor case

The one federal case is Collegiate Basketball Officials Ass'n v. NLRB, 836 F.2d 143 (3d Cir. 1987), aff'g Big East Conference, 282 N.L.R.B. 335 (1986). In this case, the CBOA sought to be the collective bargaining representative for college basketball officials. The National Labor Relations Board (NLRB) denied them that status, ruling that the officials were independent contractors and consequently unable to collectively bargain.

The 3d Circuit upheld the NLRB, but it did so because the NLRB is the organization which is charged with making these decisions and the decision was supported by "substantial evidence." CBOA, 836 F.2d at 849. Normally, a 3d Circuit ruling that amateur sports officials are independent contractors would be definitive precedent which would make amateur sports officials independent contractors in labor and tax cases. However, the 3d Circuit's reliance upon the NLRB's expertise means that the 3d Circuit's ruling has little (if any) precedential value outside of the limited context of a labor case.

While the CBOA case provides little precedential value, it does contain valuable guidance on how courts should make the determination of whether amateur sports officials are independent contractors. The 3d Circuit made it quite clear that it believed that things like wearing a uniform and having to show up to a game 90 minutes early did not make college basketball officials employees even though these are the types of things which normally do make workers employees. Indeed, the 3d Circuit went so far as to note that officiating is a high skill

industry in which participants control whether they will accept or reject their game assignments. The 3d Circuit concluded that officiating is a unique industry which "ill fits the usual distinction between independent contractors and employees." CBOA, 836 F.2d at 149.

c.) Summary

Federal law is scarce but it does indicate that amateur sports officials are independent contractors. However, the scarcity of the law leaves substantial openings for sports officials to be found employees of schools, teams, leagues, and sports governing bodies. The chances of sports officials being ruled employees become even greater in postseason events where sports officials associations no longer play a predominant role in controlling the assignments, evaluations and management of the official in his or her relationship with the sponsor of the event.

4.) Current status under state law

Fourteen states have ruled that amateur sports officials are independent contractors. Eight of these states have passed legislation making amateur sports officials independent contractors. The other six states have published judicial opinions to that effect. There is neither state legislation nor any state judicial opinions which make amateur sports officials employees. Interestingly, all fourteen of these states have only made amateur sports officials independent contractors for purposes of workers' compensation. None of them have addressed whether amateur sports officials are employees or independent contractors for unemployment insurance purposes.

a.) The workers' compensation legislation

The eight states with legislation making amateur sports officials independent contractors for workers' compensation purposes are Alaska, California, Georgia, Idaho, Missouri, Montana, Oregon and Virginia. For those who are interested in reading this legislation, the citations are. Alaska Stat. Sec. 23.30.230(a)(4); Cal. Labor Code Sec. 3352(n); Ga. Code Ann. Sec. 34-9- Idaho Code Sec 72-212(12) (pocket part); Mo. Rev. Stat. Sec. 287.090 1(6) (pocket part); Mont. Code Ann. Sec. 39-71-401(2)0); Or. Rev. Stat. Sec. 656.027(13) (supp. 1996); and Va. Code Ann. Sec. 65.2- 101 (definition of employee (2)(m)).

All eight states make amateur sports officials independent contractors no matter who the employer is. Thus, a high school baseball umpire is an independent contractor regardless whether his employer is deemed to be: (1) the school, team or other entity organizing the game (2) the league or conference; (3) the governing body; or (4) the officials association. The legislation simply does not distinguish between these four possible employers of a sports official.

However, it should be noted that most of these states specifically exclude people officiating a game played or run by an entity which normally employs them from the definition of independent contractor. The intent of this exclusion is to make sure that municipal recreation workers and other similarly situated workers do not lose their normal workers' compensation protection simply because they happen to be officiating, monitoring or supervising as part of their normal employment activities. These workers are clearly functioning as employees and should not be lumped in with the vast majority of independent sports officials, such as Amateur Softball Association (ASA) umpires, high school volleyball or college football officials. A high school teacher or college employee can keep his or her normal workers' compensation while officiating games in his or her school district or University system. An auxiliary benefit of this exception is that a high school teacher or college employee can keep his or her normal workers' compensation while officiating games in his or her school district or University system.

b.) The published judicial opinions

Six states have published court opinions holding that amateur sports officials are independent contractors: South Carolina, New York, Pennsylvania, New Jersey, Colorado and Maryland. These courts have found amateur sports officials to be independent contractors in their relationships with schools, leagues and the officials associations which assign the games. However, no published opinion has addressed whether amateur sports officials are employees or independent contractors in their relationships with sports governing bodies. Thus, the strange situation where a sports official could be an independent contractor during the regular season but an employee of the governing body during the postseason could – but is not likely to – occur at the state level.



These six published decisions are all based on the official's right to control the manner in which he or she conducts the game. The six decisions are set out below:

1. The South Carolina Court of Appeals held that a high school football official was not an employee of the school he serviced, the league which sponsored the game nor the officials association which assigned him the game. None of those entities had the right to control how the official called the game. Farrar v. D.W. Daniel High-Sch., 309 S.C. 523, 525, 424 S.E.2d, 543, 544-45 (S.C. Ct. App. 1992).
2. The New York Supreme Court, Appellate Division held that an official was not an employee of the school whose game he officiated because he provided his own equipment and was treated like an independent contractor. O'Neil v. Blasdel High Sch., 1 A.D.2d 854, 148 N.Y.S.2d 792 (App. Div. 1956).
3. The Pennsylvania Commonwealth Court held that a clause in the Pennsylvania Interscholastic Athletic Association's (the state governing body) constitution which gave the school principal control over all interscholastic events did not make the official a school employee because the official had total control over the officiating of the game. Lynch V. Workmen's Compensation Appeal Bd., 554 A.2d 159, 161-62 (Pa. Commw. Ct. 1989), appeal denied, 525 Pa. 629, 578 A.2d 416 (1990).
4. The Appellate Division of the New Jersey Superior Court noted the official's right to control the game and also found that basketball officials are running a business separate from the league and any link to the league. Ehehalt v. Livingston Bd. Of Educ., 147 N.J. Super. 511, 371 A.2d 752, 753 (N.J. Super. Ct. App. Div. 1977).
5. The Colorado Court of Appeals also noted the official's right to control the game. The Court further noted that officials are not hired on a continuous basis to conduct school activities — rather they are hired on a job by job basis. Moreover, referees had notice through an officials contract that they were viewed as independent contractors and expected to provide their own liability coverage. Brighton Sch. Dist. v. Lyons, 873 P.2d 26, 29 (Colo. Ct. App. 1993), rehearing denied (1993), cert. denied (Colo. 1994).
6. Finally, in Maryland, a softball umpire was held an independent contractor in his relationship with his umpires association. The fact that

his umpires association trained him, had a minimum game requirement, assessed assignors fees and tested and fined its members did not make the umpire an employee as long as he controlled the manner in which he called the game. Gale v. Greater Washington Softball Umpires Ass'n., 19 Md. App. 481, 485, 488, 311 A.2d 817 820, 822 (Md. Ct. Spec. App. 1973).

The Arizona Court of Appeals and the Louisiana Court of Appeals have also addressed whether amateur sports officials were independent contractors or employees. In fact, both states found that amateur sports officials were not employees of state high school governing bodies.

However, the Arizona case was not published. See Aetna Casualty & Sur. v. Arizona Interscholastic Ass'n., No. 2 Ca-Cv 92-0161, 1992 WL 321360, at \*5, 1992 Ariz. App. Lexis 301, at \*14-16 (Ariz. Ct. App. Nov. 10, 1992). Thus, the case has no precedential value.

The Louisiana case never concluded that officials were independent contractors. Rather, it concluded that high school officials were not employees of the Louisiana High School Athletic Association during the regular season because schools and leagues were running the games. See Harvey v. Ouachita Parish Sch. Bd., 545 So.2d 1241 (La. Ct. App. 1989). Despite strong indications that sports officials are independent contractors, this Louisiana decision leaves the door open for amateur officials to be found employees of a sports governing body during the postseason.

Finally, the Idaho Supreme Court considered this issue in a workers' compensation case. The Idaho Supreme Court held that a county school district was liable for workers' compensation payments to an injured sports official, thereby classifying amateur sports officials as employees for state employment tax purposes. Ford v. Bonner County Sch. Dist., 101 Idaho 320, 612 P.2d 557 (1980). Ford would be the only case where a sports official was held an employee. However, the Idaho legislature was so concerned with the economic ramifications of the decision (namely increased tax liability and vicarious tort liability imposed upon its public schools and municipal athletic programs) that it immediately passed legislation making amateur sports officials independent contractors for workers' compensation purposes. That legislation was discussed earlier in this section. Ford has no precedential value at all as it was reversed by the Idaho legislature. However, Ford does

demonstrate what would probably happen if courts declared amateur sports officials employees. The astronomical tax and liability costs would place state schools, municipal recreation leagues and even privately sponsored leagues in economic danger and most states would quickly draft legislation to avoid the consequences. In short, states can't really afford to have amateur sports officials be employees.

c.) The unemployment issue

There are no published opinions addressing whether amateur sports officials are independent contractors for unemployment insurance purposes. Tax agencies have only recently become aggressive in pursuing revenue generated from amateur sports officiating. There simply hasn't been enough time to develop a sufficient number of incidents to generate a body of published opinions.

There is also no legislation on this issue. This is a result of the Department of Labor intimidating states into not passing independent contractor unemployment legislation by claiming the legislation would create a conflict with the Federal Unemployment Tax Act (FUTA). 26 U.S.C. 3301 et. seq..

Under FUTA, employers must pay federal unemployment taxes on their employees' wages. However, the federal government gives employers a 90% credit for payments into certified state unemployment program. 26 U.S.C. Sec. 3302; *Ibarra v. Texas Employment Comm'n*, 823 F.2d 873, 874 (5th Cir. 1987). Also, the federal government provides an administrative subsidy to states which run certified unemployment programs. 42 U.S.C. Secs. 501-503; *New York Tel. Co. v. New York Labor Dept.*, 440 U.S. 519, 536 (1978). A state's unemployment program must be consistent with FUTA requirements in order to be certified by the Department of Labor. Without certification, the employers will lose their tax credit and the state administrative subsidy will be revoked. 26 U.S.C. Sec. 3304.

The Department of Labor claims that state unemployment programs which make amateur sports officials independent contractors are inconsistent with FUTA. The Department bases this argument on 1970 and 1976 amendments to FUTA which required state unemployment programs to cover school employees and the employees of nonprofits

with four or more employees. 26 U.S.C. Sec. 3309 (a) and (b). These employees used to fall under two of the twenty listed exemptions from FUTA coverage set out in 26 U.S.C. Sec. 3306(c). The only way a certified state program can exempt these employees now is if they fall under one of the other eighteen exemptions. The Department of Labor argues that amateur sports officials are employees who often work for schools and nonprofits and do not fall under any exemption.

Thus, the Department of Labor threatened to decertify the Alaska unemployment program in 1989 after Alaska passed House Bill 147, which made Alaska's amateur sports officials independent contractors for unemployment insurance purposes. The Department of Labor immediately notified Alaska that HB 147 created a FUTA consistency conflict. Alaska was forced to repeal HB 147 in June of 1990. In 1998, Alaska passed a new Bill (HB 484) which makes amateur sports officials independent contractors until December 31, 1999. After 1999, the independent contractor status will terminate unless the federal government amends FUTA to protect amateur sports officials.

Similarly, the California unemployment agency (the Employment Development Department) was sympathetic to classifying amateur sports officials as independent contractors in 1995. However, the agency noted the risk of FUTA inconsistency. This conflict was resolved by using the state regulatory scheme to draw very specific requirements which officials must meet in order to be independent contractors for unemployment purposes. These regulations are set out at Cal. Code Regs. Title 22 Sec. 4304-10.

The Department of Labor can intimidate state legislatures. Obviously, a state legislature cannot politically afford to put their entire state unemployment program at risk of losing its subsidy. However, state court judges may not be subject to political intimidation and, as we have seen, they always find amateur sports officials to be independent contractors. A state court published opinion that amateur sports officials are independent contractors for unemployment insurance purposes could create a dangerous situation. The state unemployment agency would be bound by the decision, but would simultaneously be in jeopardy of losing its federal subsidy. The federal government would likely step in and pass FUTA legislation exempting sports officials in order to avert political disaster. Worse, it is highly likely that the Department of Labor is misinterpreting FUTA. The Department of

Labor's argument that amateur sports officials do not fall into one of the FUTA exemptions ignores the fact that FUTA specifically exempts any worker who is a common law independent contractor. 26 U.S.C. Secs. 3306(i) and 3121(d). Further, the federal courts make it clear that these common law standards apply. The Supreme Court stated that anyone who is an independent contractor under common law standards is exempt from FUTA provisions. United States v. Webb, 397 U.S. 179, 183 (1970). The Federal Court of Appeals has said, on numerous occasions, that the common law standards apply. For an example, see General Inv. Corp. v. United States, 823 F.2d 337, 341 (9th Cir. 1987).

The FUTA exemption for common law independent contractors simply means that anyone who is found to be an independent contractor in published cases is an independent contractor for FUTA. The previous sections of this report noted that all fourteen published state cases, the one unpublished state case, the one state case which did not fully address the issue and the one federal published case all held amateur sports officials to be independent contractors. Thus, amateur sports officials should be automatically exempt from FUTA and should not have to fall into any of the twenty special classes of employees who are exempt. In short, independent contractors don't need to gain exemptions from the definition of employee; they're already exempt. Nevertheless, no state legislature can afford to back amateur sports officials if it means picking a fight with the Department of Labor and putting an entire state administrative program at risk of losing its funding.

d.) Summary

Amateur sports officials can safely assume that they are independent contractors for workers' compensation purposes. The officials in the eight states with legislation can be absolutely certain. The officials in the six states with precedential published opinions can safely assume that they are independent contractors except when they officiate a postseason game. In the postseason, an amateur sports official's status is still uncertain — although it would seem strange to have a person become an employee for one day after he or she was an independent contractor for 364 days. The officials in states with neither published opinions or legislation can assume that they are independent contractors, but they can also assume that their status could be challenged and they might have to engage in an expensive legal battle

to be found independent contractors.

It is not clear whether amateur sports officials are employees or independent contractors for unemployment insurance purposes. While most courts have ruled that amateur sports officials are independent contractors, the issue has not come up in the unemployment context. However, it would seem strange to be an independent contractor for one purpose and an employee for another. Finally, the Department of Labor does not seem to be convinced that amateur sports officials are independent contractors. The influence which the Department of Labor can bring to bear under FUTA means that more states may assess unemployment taxes against amateur sports officials in order to avoid potential FUTA conflicts.

#### 5.) Current legislative movements

Groups in Florida and Nevada are currently working on state legislation. It is not clear how much progress they have made at this time. The most important current legislation is at the federal level. U.S. Senator Ted Stevens of Alaska has been listening to testimony and reviewing documents on the FUTA issue for the past two years. Much of this testimony has been mixed in with Senator Stevens's review of possible amendments to the Amateur Sports Act, which governs the administration of the U.S. Olympic movement. Don Collins, author of this report and an expert in employment issues and Robert Kanaby, Executive Director of the National Federation of State High School Associations, have both been involved in work on the Amateur Sports Act amendments, and Senator Stevens is considering using language similar to that submitted by Mr. Collins.

Obviously, if Senator Stevens can pass FUTA legislation making amateur sports officials independent contractors he will also ensure that the Alaska state legislation won't die because of a FUTA inconsistency problem. It is also likely that many states will automatically amend their state codes to exempt amateur sports officials simply to stay consistent with FUTA. Thus, Senator Stevens could have an enormous national impact if he can pass FUTA independent contractor legislation.

#### 6.) Model Legislation

NASO does not have a formal position on this issue. After all, amateur sports officials can derive some benefits from being employees. For example, they can join unions and collectively bargain. However, NASO does wish for any of its members who wish to pursue independent contractor legislation to have a good base of information. Thus, this report concludes with model legislation. This model is the same model which was used in California, Virginia and Georgia. It is the model language provided to the Nevada and Florida groups.

Readers should note that this model language only covers state workers' compensation legislation. Because of the complexity of the unemployment issue, it is not advisable to rely upon a model. Indeed, it may not be wise to tackle the unemployment issue until Senator Stevens's federal FUTA legislation has been voted on.

#### MODEL LEGISLATION

Step one - Find the section of your state code which lists groups of workers who are exempt from the definition of employee for workers' compensation purposes (this is usually called the Labor Code). Usually, there'll be quite a few exempt groups and they'll be listed in a tabulated form. Go to the last item in the tabulated list. If the tab is a numerical tab, your legislation will be the next number. If it is an alphabetical tab, your legislation will be the next letter.

Step two - Add sports officials to the list of exempt employees.

Step three - Define sports officials. This will save a lot of people the trouble of having to go to court later on.

Step four - Eliminate those people who are normal employees of the entity sponsoring the game (remember the discussion of municipal employees in part (4)(a)).

Step five - Make sure that you haven't eliminated anyone who doesn't want to be eliminated in step four. For example, in California all regular employees are exempt. Thus, a high school teacher keeps his workers' compensation protection when officiating within his own school district. Californians had no problem with this. However, in Florida the

teachers didn't want to be exempt because they didn't want their paychecks reduced by the amount of the workers' compensation taxes. Thus, the legislation in Florida must account for this.

When you have completed all five steps, you will have something that looks like this:

Section \_\_\_\_\_ of the \_\_\_\_\_ (probably Labor) Code is amended to read:

Employee excludes the following:

(tab section) Any person providing services as a sports official at a sports event in which the players are not compensated. In this paragraph, "sports officials" includes an umpire, referee, judge, scorekeeper, timekeeper, organizer, or other person who is a neutral participant in a sports event. This exclusion does not apply to workers' compensation claims against schools, associations of schools or other organizations sponsoring a sports contest where the claimant is a sports official who is a regular employee of such school, association of schools, or other organization sponsoring the sports contest.



A few notes:

1.) Some states just don't like the idea of giving a break to for profit organizations. Thus, your first sentence may have to delete the language "at a sports event at which the players are not compensated" and substitute "for an entity sponsoring an intercollegiate or interscholastic sports event or an entity which is a public entity or private nonprofit organization sponsoring an amateur sports event." This may also require some minor adjustments to the last sentence of the model.

2.) In a state like Florida, where interscholastic teachers don't want to be employees but you still need to protect municipal recreation workers, simply alter the last sentence as follows: "This exclusion does not apply to workers' compensation claims against organizations sponsoring a sports contest where the claimant is a sports official who is a regular employee of the organization sponsoring the contest except where the claimant is officiating an interscholastic (high school, middle school or elementary school) contest."

Hopefully, this report and this Model Legislation proves helpful to those who wish or need to use it. Should you have any questions, feel free to contact the NASO office.

(e) A person or entity shall otherwise qualify as an independent contractor and not an employee if such person or entity meets all of the following criteria:

- (1) Is a party to a contract, written or implied, which intends to create an independent contractor relationship;
- (2) Has the right to exercise control over the time, manner, and method of the work to be performed; and
- (3) Is paid on a set price per job or a per unit basis, rather than on a salary or hourly basis.

A person who does not meet all of the above listed criteria shall be considered an employee unless otherwise determined by an administrative law judge to be an independent contractor.

(f)(1) As used in this subsection, the term 'sports official' means any person who is a neutral participant in a sports event, including without limitation an umpire, referee, judge, linesman, scorekeeper, or timekeeper. The term 'sports official' does not include any person, otherwise employed by an organization or entity sponsoring a sports event, who performs services as a sports official as a part of his or her regular employment.

(2) Notwithstanding any other provision of this chapter, a person shall qualify as an independent contractor and not an employee if such person performs services as a sports official for an entity sponsoring an interscholastic or intercollegiate sports event or if such person performs services as a sports official for a public entity or a private, nonprofit organization which sponsors an amateur sports event.

*Last modified: April 25, 2006*

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states or territories or between the District of Columbia and any of the states or territories and any foreign nation or nations, and any person suffering injury or death while he is employed by such carrier in such commerce. This title shall not be construed to lessen the liability of any such common carrier or to diminish or take away in any respect any right that any person so employed, or the personal representative, kindred or relation, or dependent of such person, may have under the act of Congress relating to the liability of common carriers by railroad to their employees in certain cases, approved April 22, 1908, or under §§ 8.01-57 through 8.01-62 or § 56-441.

j. Employees of common carriers by railroad who are engaged in intrastate trade or commerce. However, this title shall not be construed to lessen the liability of such common carriers or take away or diminish any right that any employee or, in case of his death, the personal representative of such employee of such common carrier may have under §§ 8.01-57 through 8.01-61 or § 56-441.

k. Except as provided in subdivision 1 of this definition, a member of a volunteer fire-fighting, lifesaving or rescue squad when engaged in activities related principally to participation as a member of such squad whether or not the volunteer continues to receive compensation from his employer for time away from the job.

l. Except as otherwise provided in this title, noncompensated employees and noncompensated directors of corporations exempt from taxation pursuant to § 501 (c) (3) of Title 26 of the United States Code (Internal Revenue Code of 1954).

m. Any person performing services as a sports official for an entity sponsoring an interscholastic or intercollegiate sports event or any person performing services as a sports official for a public entity or a private, nonprofit organization which sponsors an amateur sports event. For the purposes of this subdivision, "sports official" includes an umpire, referee, judge, scorekeeper, timekeeper or other person who is a neutral participant in a sports event. This shall not include any person, otherwise employed by an organization or entity sponsoring a sports event, who performs services as a sports official as part of his regular employment.

"Employer" includes (i) any person, the Commonwealth or any political subdivision thereof and any individual, firm, association or corporation, or the receiver or trustee of the same, or the legal representative of a deceased employer, using the service of another for pay and (ii) any volunteer fire company or volunteer lifesaving or rescue squad electing to be included and maintaining coverage as an employer under this title. If the employer is insured, it includes his insurer so far as applicable.

"Executive officer" means (i) the president, vice-president, secretary, treasurer or other officer, elected or appointed in accordance with the charter and bylaws of a corporation and (ii) the managers elected or appointed in accordance with the articles of organization or operating agreement of a limited liability company. However, such term does not include noncompensated officers of corporations exempt from taxation pursuant to § 501 (c) (3) of Title 26 of the United States Code (Internal Revenue Code of 1954).

"Filed" means hand delivered to the Commission's office in Richmond or any regional office maintained by the Commission; sent by telegraph, electronic mail or other means of electronic transmission approved by the Commission or facsimile transmission; or posted at any post office of the United States Postal Service by certified or registered mail. Filing by first-class mail, telegraph, electronic mail or other means of electronic transmission or facsimile transmission shall be deemed


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## New state law clarifies that sports officials are independent contractors, not employees

Posted July 23rd, 2011

GAINESVILLE – Since the Florida High School Activities Association first began registering contest officials in the 1930s, the FHSAA has considered them to be independent contractors. Now, thanks to a new law enacted by the Florida Legislature during the 2011 session, the State of Florida has taken that position as well.

Committee substitute for House Bill 1803, which amended section 440.02 of Florida Statutes, adds sports officials of interscholastic and amateur sporting events to the list of persons who are not classified as "employees." The new law defines a "sports official" as any person who is a neutral participant in a sporting event, and classifies such a person as an "independent contractor."

The new law protects the FHSAA and its member schools from any potential worker's compensation claim that might be filed by a sports official who is injured in the performance of his or her duties. It protects the FHSAA's more than 5,700 individual sports officials from any regulations pertaining to employees that might be enacted by Federal, state or local governments – including district school boards or individual private schools – such as having Federal income tax withheld from checks in payment of their fees for officiating contests.

The original bills in the Senate and House of Representatives were sponsored respectively by Sen. Tom Rossin (D-West Palm Beach) and Rep. Bob Henriquez (D-Tampa) at the request of the FHSAA. The substitute bill that ultimately passed was sponsored by the House Committee on Insurance. It was signed into law by Gov. Jeb Bush on May 30. The new law takes effect Oct. 1.

The Florida High School Activities Association is the governing body for interscholastic athletic competition in Florida. It has a membership of more than 640 middle, junior and senior high schools. Individuals who wish to officiate athletic contests in which FHSAA member schools participate must be registered as contest officials with the FHSAA Office.

Text of amendment to section 440.02, Florida Statutes:

"A person who performs services as a sports official for an entity sponsoring an interscholastic sports event or for a public entity or private, nonprofit organization that sponsors an amateur sports event. For purposes of this subparagraph, such a person is an independent contractor. For purposes of this subparagraph, the term 'sports official' means any person who is a neutral participant in a sports event, including, but not limited to, umpires, referees, judges, linespersons, scorekeepers, or timekeepers. This subparagraph does not apply to any person employed by a district school board who serves as a sports official as required by the employing school board or who serves as a sports official as part of his or her responsibilities during normal school hours."

Contact:

Jack Watford  
Director of Communications, FHSAA  
(352) 372-9551 ext. 170  
[jwatford@fhsaa.org](mailto:jwatford@fhsaa.org)

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local or state law enforcement agency in an adjoining state and who is deputized to work under the supervision of a California peace officer pursuant to paragraph (4) of subdivision (a) of Section 832.6 of the Penal Code.

(m) Any law enforcement officer who is regularly employed by the Oregon State Police, the Nevada Department of Motor Vehicles and Public Safety, or the Arizona Department of Public Safety and who is acting as a peace officer in this state pursuant to subdivision (a) of Section 830.32 of the Penal Code.

(n) Any person, other than a regular employee, performing services as a sports official for an entity sponsoring an intercollegiate or interscholastic sports event, or any person performing services as a sports official for a public agency, public entity, or a private nonprofit organization, which public agency, public entity, or private nonprofit organization sponsors an amateur sports event. For purposes of this subdivision, "sports official" includes an umpire, referee, judge, scorekeeper, timekeeper, or other person who is a neutral participant in a sports event.

(o) Any person who is an owner-builder, as defined in subdivision (a) of Section 50692 of the Health and Safety Code, who is participating in a mutual self-help housing program, as defined in Section 50087 of the Health and Safety Code, sponsored by a nonprofit corporation.

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*Last modified: January 15, 2011*



# *Missouri Revised Statutes*

## **Chapter 287**

### **Workers' Compensation Law**

#### **Section 287.090**

August 28, 2010

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#### **Exempt employers and occupations--election to accept--withdrawal--notification required of insurance companies.**

287.090. 1. This chapter shall not apply to:

(1) Employment of farm labor, domestic servants in a private home, including family chauffeurs, or occasional labor performed for and related to a private household;

(2) Qualified real estate agents and direct sellers as those terms are defined in Section 3508 of Title 26 United States Code;

(3) Employment where the person employed is an inmate confined in a state prison, penitentiary or county or municipal jail, or a patient or resident in a state mental health facility, and the labor or services of such inmate, patient, or resident are exclusively on behalf of the state, county or municipality having custody of said inmate, patient, or resident. Nothing in this subdivision is intended to exempt employment where the inmate, patient or resident was hired by a state, county or municipal government agency after direct competition with persons who are not inmates, patients or residents and the compensation for the position of employment is not contingent upon or affected by the worker's status as an inmate, patient or resident;

(4) Except as provided in section 287.243, volunteers of a tax-exempt organization which operates under the standards of Section 501(c)(3) of the federal Internal Revenue Code, where such volunteers are not paid wages, but provide services purely on a charitable and voluntary basis;

(5) Persons providing services as adjudicators, sports officials, or contest workers for interscholastic activities programs or similar amateur youth programs who are not otherwise employed by the sponsoring school, association of schools or nonprofit tax-exempt organization sponsoring the amateur youth programs.

2. Any employer exempted from this chapter as to the employer or as to any class of employees of the employer pursuant to the provisions of subdivision (3) of subsection 1 of section 287.030 or pursuant to subsection 1 of this section may elect coverage as to the employer or as to the class of employees of that employer pursuant to this chapter by purchasing and accepting a valid workers' compensation insurance policy or endorsement, or by written notice to the group self-insurer of which the employer is a member. The election shall take effect on the effective date of the workers' compensation insurance policy or endorsement, or by written notice to the group

Section #. 895.48 (1m) (a) (intro.) of the statutes is amended to read:

895.48 (1m) (a) (intro.) Except as provided in par. (b), any physician, physician assistant, podiatrist, or athletic trainer licensed under ch. 448, chiropractor licensed under ch. 446, dentist licensed under ch. 447, emergency medical technician licensed under s. 256.15, first responder certified under s. 256.15 (8), registered nurse licensed under ch. 441, or a massage therapist or bodywork therapist licensed under ch. 460 who renders voluntary health care to a participant in an athletic event or contest sponsored by a nonprofit corporation, as defined in s. 66.0129 (6) (b), a private school, as defined in s. 115.001 (3r), a tribal school, as defined in s. 115.001 (15m), a public agency, as defined in s. 46.856 (1) (b), or a school, as defined in s. 609.655 (1) (c), is immune from civil liability for his or her acts or omissions in rendering that care if all of the following conditions exist:

**NOTE:** Par. (a) (intro.) is shown as affected by 3 acts of the 2009 Wisconsin legislature and as merged by the legislative reference bureau under s. 13.92 (2) (i).

**History:** 1977 c. 164; 1987 a. 14; 1989 a. 31; 1993 a. 109; 1995 a. 227; 1997 a. 67, 156, 191; 1999 a. 7, 9, 32, 56, 186; 2001 a. 74; 2003 a. 33; 2005 a. 155, 188, 486; 2007 a. 130; 2009 a. 113, 302, 355; s. 13.92 (2) (i).



State of Wisconsin  
2011 - 2012 LEGISLATURE



LRB-3311/1  
GMM...

IN 10/25

from  
Fri. 10/26

Gen

1 AN ACT ...; relating to: excluding sports officials from coverage under the  
2 worker's compensation law.

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***Analysis by the Legislative Reference Bureau***

Under current law, subject to certain exceptions, every person in the service of another under any contract of hire, express or implied, is considered to be an employee for purposes of the worker's compensation law, which requires an employer that is subject to that law to pay disability benefits and the cost of medical treatment for an employee who sustains an injury while performing services growing out of and incidental to employment. Current law, however, excludes from the coverage under the worker's compensation law independent contractors who, among other things, maintain separate businesses, operate under contracts to perform specific services or work for specific amounts of money, may realize a profit or suffer a loss under those contracts, and control the means of performing their services or work.

This bill excludes from coverage under the worker's compensation law a person performing services as an umpire, referee, judge, scorekeeper, timekeeper, organizer, or as any other neutral participant in a sports event or contest (sports official) for a public, private, or tribal school; an institution of higher education; a nonstock, nonprofit corporation; or a public agency (the state or a county, city, village, or town) that is sponsoring an interscholastic, intercollegiate, or other amateur sports event or contest, unless the person performing those services is otherwise employed by the sponsor of the event or contest and performs those services as part of his or her regular employment duties.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***



**SECTION 1.** 102.07 (4) (a) 1m. of the statutes is created to read:

102.07 (4) (a) 1m. Any person performing services as a sports official for a school district, a private school, as defined in s. 115.001 (3r), a tribal school, as defined in s. 115.001 (15m), an institution of higher education, as defined in s. 895.515 (1) (b), a nonstock, nonprofit corporation organized under ch. 181, or a public agency, as defined in s. 256.15 (1) (n) that is sponsoring an interscholastic, intercollegiate, or other amateur sports event or contest, unless the person performing those services is otherwise employed by the sponsor of the event or contest and performs those services as part of his or her regular employment duties. In this subdivision, "sports official" means an umpire, referee, judge, scorekeeper, timekeeper, organizer, or any other neutral participant in a sports event or contest.

**SECTION 2. Effective date.**

(1) **WORKER'S COMPENSATION COVERAGE OF SPORTS OFFICIALS.** This act takes effect on July 1, 2012.

**(END)**

**Godwin, Gigi**

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**From:** Youngman, Lori  
**Sent:** Monday, November 21, 2011 10:34 AM  
**To:** LRB.Legal  
**Subject:** Draft Review: LRB 11-3311/1 Topic: Worker's compensation; exclusion of athletic officials from coverage

Please Jacket LRB 11-3311/1 for the ASSEMBLY.